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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GILBERT MICHAEL AYALA, Defendant and Appellant.	F075301 (Super. Ct. No. 16CR-03935-RF) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Sara Elizabeth Coppin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted defendant Gilbert Michael Ayala of two counts of evading an officer (Veh. Code, § 2800.2, subd. (a); counts 1 and 4) and two counts of receiving

stolen property (Pen. Code, § 496d, subd. (a); counts 3 and 6) after he fled from police on separate occasions in two different stolen cars. On appeal, Ayala challenges his convictions arguing, (1) the trial court erred in admitting evidence of his prior convictions for auto theft and reckless evasion from 2012 pursuant to Evidence Code section 1101, subdivision (b); (2) insufficient evidence supports his convictions for receiving stolen property under Penal Code section 496d because the prosecutor did not prove the value of the vehicles exceeded $950; (3) the court reversibly erred in failing to sua sponte instruct the jury that the People had to prove the value of the vehicles exceeded $950; and (4) the court reversibly erred in failing to instruct the jury on the definition of "theft."

We affirm the judgment.

FACTUAL BACKGROUND

At the end of January 2015, Kevin Immediano realized his car, a 1996 black Honda Accord, was missing. He called the police and filed a police report. He still had the keys to the car and had not given anyone permission to drive it. He estimated the car was worth "a few thousand dollars at max."

At approximately 11:30 a.m. on February 4, 2015, Detective Joseph Perez saw Ayala driving a black Honda Accord about ten feet away. They were driving towards each other and made "direct eye contact." Detective Perez identified Ayala in court as the driver.

Detective Perez was driving an unmarked car equipped with emergency lights and an audible siren which he activated.[1] He turned his car around and began to follow Ayala. Rather than slow down to a stop, Ayala "started to speed up [to] about approximately 90 miles an hour, [and] got onto northbound Highway 99[,]" and drove for about two to three miles "swerving in and out of traffic" before exiting. After exiting,

[1] Before trial, the court instructed the jury that police "had legal cause to stop Mr. Ayala on June 12, 2016 and on February 4th, 2015" and the jury was not to speculate about the reasons for the stops.

Ayala continued driving past an elementary school at approximately 60 miles per hour. He drove through stop signs and made numerous turns. At some point, Detective Perez "lost visual contact" with the car. He and other officers continued to check the area. They "ultimately found the vehicle abandoned" with the door open and radio on. The car's ignition had been tampered with so that a screwdriver or knife could be used to start it. Detective Perez explained that, based on his experience, it was common for the ignition in a stolen car to have been tampered with so that a shaved key could be used to start it. He did not notice any evidence of forced entry into the car but noted a "Slim Jim," a "device used to unlock doors to vehicles" without breaking the window, and a shaved key could also be used. Using the vehicle identification number, the police determined Kevin Immediano was the car's registered owner. Two days later, Officer John Pinnegar received information regarding Ayala's whereabouts. He knew a warrant had issued for Ayala's arrest and he took him into custody.

On June 12, 2016, Adrian Nunez realized his green 1995 Honda Accord (registered in his father's name) was missing after neighbors and the police called him and told him it had been stolen. The car had been parked at his father's house while his father was in Mexico. Nunez still had the keys and no one else had permission to drive the car. He estimated the car was worth between $1000 and $2000 when it was taken. He stated he had never met Ayala before and, to his knowledge, his father had not given Ayala permission to drive the car.

That day, Officer Pinnegar saw Ayala driving a green 1995 Honda Accord and tried to pull him over. Officer Pinnegar was wearing his uniform in a marked car and activated his emergency lights and sirens. Ayala did not stop. Instead, he threw his hands in the air, made a U-turn and continued driving, running through approximately seven to eight stop signs at approximately 60 miles per hour in a 30 mile per hour speed zone. Officer Pinnegar continued to follow Ayala until Ayala exited the car and ran. The Accord continued to travel forward and Officer Pinnegar positioned his car to stop it,

causing the Accord to hit the back of Officer Pinnegar's car. The People played footage from Officer Pinnegar's body camera from the date of the incident.

Officer Pinnegar knew Ayala's girlfriend lived nearby and went to her residence. The police kicked in the door and found a pantless Ayala inside. Ayala asked for his pants and the police searched the pants, finding shaved keys.

Before trial, the court held admissible evidence of Ayala's previous auto theft on the issue of intent to evade and lack of mistake under Evidence Code section 1101, subdivision (b). Before the prosecutor introduced evidence of the prior offense, the court instructed the jury:

> "Ladies and gentlemen, you're going to hear evidence regarding a series of events that occurred and that are not the current charges, but a set of events that occurred … some time in December of 2012. And there'll be more detailed instructions on how you can consider it, but you can only consider this evidence for very limited purposes … as to whether [Ayala] had an intent or mental state that's required for one or more of the crimes with which he's currently charged. There will be an instruction that spells this out in more detail I'll give you when we instruct you on the lawsuit. But you cannot consider it as evidence that he had a propensity to commit felony evading, auto theft, or receiving stolen motor vehicles.
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> "You cannot consider it for propensity purposes, or that he had disposition. You can only consider [it] as evidence that he had the necessary state of mind that's required with respect to the current charges. It's a very limited use for which – use this information. And, again, the purposes for which you can consider it will be spelled out in the instructions, which will be given to you. Okay. And also, you are admonished that you can't consider it for propensity purposes."

James Levine then testified he owned a 1995 Honda Accord that went missing in December 2012. He reported it stolen to police and they eventually found it.

On December 20, 2012, at around 11:00 p.m., Officer J. Gonzales saw a black Honda Accord pass him in which the driver was not wearing a seatbelt. He pulled behind the car which sped up and began making turns before turning onto a grass walkway not meant for vehicular travel. Officer Gonzales, who was in a marked police car, activated his red and blue flashing lights. The Accord "continued to take off," "trying to evade" Officer Gonzales. It ran through stop signs at about 50 to 60 miles per hour and sped up to 80 miles per hour in more open areas. Additional officers joined the pursuit. The car eventually came to a stop after colliding with a parked car. Ayala exited the Accord and began running south. Officer Gonzales identified Ayala in court as the individual he saw get out of the car. He testified Ayala was wearing a green jacket recovered near a fence Ayala jumped over. Officer Gonzales found two shaved keys lying on the ground near the fence; another officer apprehended Ayala under a bridge on the other side of the fence. Police recovered a shaved key in the car's ignition and discovered the car was registered to James Levine.

In connection with the June 12, 2016 and February 4, 2015 incidents, respectively, the People charged Ayala with evading an officer (Veh. Code, section 2800.2, subd. (a)) in counts one and four, enhanced by an allegation he was previously convicted of a serious or violent felony (Pen. Code, § 667, subds. (b)–(i))[2] and three prison prior allegations that he previously served terms as described in section 667.5 and committed a felony conviction within five years of the conclusion of his time in custody. In counts two and five, Ayala was charged with felony unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), enhanced by allegations he was previously convicted of car theft (§ 666.5), suffered a strike prior (§ 667, subds. (b)–(i)), and three allegations he served terms as described in section 667.5 and committed a felony conviction within five years of the conclusion of his time in custody. In counts three and six, Ayala was

[2] Undesignated statutory references are to the Penal Code.

charged with felony receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)), enhanced by allegations he was previously convicted of car theft (§ 666.5), suffered a strike prior (§ 667, subds. (b)–(i)), and three allegations he served terms as described in section 667.5 and committed a felony conviction within five years of the conclusion of his time in custody. The court instructed the jury it could not find Ayala guilty of "theft of a vehicle and receiving a vehicle," meaning it could not find Ayala guilty of counts two and five *and* counts three and six; rather, these offenses were charged in the alternative.

The jury convicted defendant of counts one and four (evading a police officer) and counts three and six (receiving a stolen motor vehicle) and found true the related enhancements. The court designated count three as the principal term and sentenced Ayala to the upper term of four years on that count, doubled based on the jury's finding Ayala had a prior strike offense, for a term of eight years. On count six, the court imposed one-third the mid term for an additional year, doubled based on the jury's finding that Ayala had a prior strike offense for a term of two years. As to counts one and four, the court imposed consecutive terms of an additional eight months doubled to 16 months per count based on the prior strike offenses, each to run consecutive to the principal term. Accordingly, the aggregate sentence for counts one, three, four, and six was twelve years and eight months, further enhanced by three years based on defendant's prison prior enhancements for a total term of imprisonment of fifteen years, eight months.

DISCUSSION

I. The trial court did not prejudicially err in admitting evidence of Ayala's prior convictions

Ayala contends the trial court prejudicially erred in admitting evidence of his 2012 convictions for auto theft and evading police in violation of his due process rights.

A. Relevant Factual Background

Before trial, the prosecutor moved in limine to admit evidence of Ayala's prior conviction for fleeing from a pursuing police officer in violation of Vehicle Code section 2800.2 pursuant to Evidence Code section 1101, subdivision (b) to prove "intent, common plan or scheme, and lack of mistake." Defense counsel argued the evidence was "very prejudicial" and objected to it under Evidence Code section 352. He asserted there was no "plan involved in this … behavior," in that Ayala did not plan for a "high speed chase." The court agreed with defense counsel that it was "not sure these incidents involve a common plan, but they certainly would be relevant to show intent to evade and lack of mistake." It noted evidence "offered to show intent … requires less similarity." The court then conducted an Evidence Code section 352 analysis and inquired into the amount of time the presentation of such evidence would consume. The prosecutor stated he planned to call two witnesses to prove it up, the officer involved in the chase and the officer who arrested Ayala. The court held that was not an "undue consumption of time." It also held it could not conclude such evidence was "unduly prejudicial to the point where [Ayala] is denied a fair trial on the facts of this case and the jury would be so distracted." Accordingly, it admitted evidence of the prior offenses "based on conduct testimony" not on evidence of the conviction pursuant to Evidence Code section 1101, subdivision (b).

In his opening, the prosecutor noted he needed to prove "specific intent to evade the officers in both cases, as well as to steal." He explained:

> "As part of proving intent, you'll hear of an incident in 2012. In December of 2012, Officer Gonzales of the Merced Police Department attempted to pull over [Ayala], who was driving a '94 Honda Accord. When he did so, [Ayala] failed to stop, high speed, blown stop signs. And he crashes the car and flees and is found a short time later.
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> "It's important to note that when he fled the car in the 2012 incident that near where he'd run were two shaved keys. The

> officers will tell you what shaved keys are for, something that thieves use to steal cars. Also in the ignition of the Honda in 2012 is a shaved key. Also, in the 2006 [*sic*] incident in [Ayala's] pants, a shaved key is found."

At the close of evidence, the trial court instructed the jury:

> "The People presented evidence that [Ayala] committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that [Ayala] in fact committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that [Ayala] committed the offenses, you may but are not required to consider that evidence for the limited purpose of deciding whether or not [he] acted with the intent to evade an officer as charged in Counts 1 and 4 in this case; or [he] acted with the intent to deprive the owner of possession or ownership of the vehicle for any period of time as charged in Counts 2 and 5 within this case; or [he] acted with the knowledge that the property had been stolen as charged in Counts 3 and 6 in this case; or [his] alleged actions were the result of a mistake or accident. [¶] In evaluating this evidence, consider the similarity or lack of similarly between the uncharged offense and the charged offenses. [¶] Do not conclude from this evidence that [Ayala] has bad character or is disposed to commit crime.
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> "If you conclude that [Ayala] committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that [he] is guilty of evading a peace officer, reckless driving, unlawful taking or driving of a motor vehicle and/or receiving a stolen motor vehicle. The People must still prove every charge beyond a reasonable doubt."

B. Standard of Review and Applicable Law

Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101, subd. (a).) But such evidence may

be admissible when relevant to prove a fact in issue, such as motive, opportunity, intent, knowledge, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b).)

The California Supreme Court has held subdivision (b) of Evidence Code section 1101 clarifies that " '[e]vidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." ' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

Section 352 of the Evidence Code affords the trial court discretion to exclude evidence if its probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

"[S]tate law error in admitting evidence is subject to the traditional *Watson*[3] test: The reviewing court must ask whether it is reasonably probable the verdict would have

[3] *People v. Watson* (1956) 46 Cal.2d 818.

been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Federal due process is offended only if admission of the irrelevant evidence renders the trial fundamentally unfair. (*Ibid.*)

C. Analysis

Ayala argues evidence of his 2012 convictions for auto theft and evading police was more prejudicial than probative. He contends, though such evidence was admitted for the purpose of proving intent, knowledge, and lack of mistake, "it is extremely likely that the jury actually used the evidence of the uncharged prior acts as evidence that it was [Ayala] who committed the current charges because of the crimes he committed in the past." He argues the prior crimes evidence was not sufficiently similar to the charged crimes to be admissible evidence of identity.

The People respond that defense counsel only objected to such evidence on the grounds it was more prejudicial than probative, not under "the theory that the jurors might consider the evidence for an improper purpose," namely identity, thus, forfeiting Ayala's appellate challenge on that basis. They argue Ayala's claim also fails "on the merits because nothing in the record supports [his] speculation that the jurors ignored the court's clear instructions and instead considered the evidence for an improper purpose."

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result ... tends (increasingly with each instance) to negat[e] accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act....' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." ' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)

Ayala's prior conviction was relevant to the issue of intent. To prove Ayala evaded an officer with willful disregard as alleged in counts 1 and 4, the People had to prove he fled or attempted to elude a pursuing peace officer and, in doing so, drove a vehicle with willful or wanton disregard for the safety of persons or property with the intent to evade. (See Veh. Code, §§ 2800.1, 2800.2, subd. (a).) Because Ayala pleaded not guilty to all the charges, including counts 1 and 4, all the elements of the charged offenses, including intent, were at issue. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) Here, defense counsel argued there was no evidence Ayala knew the cars he was driving were stolen; there may have been another reason he fled from police; and he did not have the "intent to deprive the lawful owner[s] of these cars." The prosecution offered the prior act evidence, and the court allowed it, for the limited purpose of establishing that Ayala drove the cars with the intent and motive of evading the police. We cannot conclude the trial court erred in concluding such evidence was relevant on that basis.

Ayala's prior conviction was sufficiently similar to the charged offenses to be admissible under Evidence Code section 1101, subdivision (b) on the issue of intent. During his prior conviction and both of the instant offenses, Ayala was seen driving a Honda Accord that did not belong to him and he fled from police at high rates of speed when he was pursued. In all three instances, he abandoned the cars to run until police ultimately caught him and discovered shaved keys. Thus, the uncharged offenses and the charged offenses shared sufficient common features to support an inference that Ayala harbored the same intent to evade police when driving away, and the evidence was relevant to the issue of Ayala's guilt or innocence of the charged offenses. (See *Ewoldt, supra,* 7 Cal.4th at p. 402.)

We also cannot conclude the trial court abused its discretion in concluding the probative value of such evidence outweighed its potential for prejudice under Evidence Code section 352. In light of the similarity between the facts related to Ayala's prior

conviction and the charged offenses, evidence of the prior offense was probative on the issue of intent; namely, that he "probably harbored the same intent" during the instant offenses, willfully fled or otherwise attempted to elude pursuing peace officers, and intended to evade the officers. The 2012 offense was not remote in time, resulted in convictions, and its underlying facts were no more inflammatory than those of the charged offenses, minimizing its potential for prejudice. On this record, we cannot conclude the trial court abused its discretion in admitting evidence of Ayala's prior convictions. (See *People v. Ortiz* (2003) 109 Cal.App.4th 104, 117–119 [no abuse of discretion admitting evidence of defendant's prior uncharged reckless driving acts under Evidence Code sections 1101, subdivision (b) and 352 where the prior acts resulted in convictions, were no more inflammatory than charged offenses, and court instructed jury to consider acts for limited purpose of establishing intent].)

We further note the jury was instructed it could only consider the evidence of the uncharged offenses on the limited issue of intent and not for propensity. We presume the jury followed this instruction and reject Ayala's argument that the jury likely considered such evidence for an improper purpose, namely to establish identity of the perpetrator. (See *People v. Avila* (2006) 38 Cal.4th 491, 574; see also *People v. Hendrix* (2013) 214 Cal.App.4th 216, 247 ["A limiting instruction can ameliorate [Evidence Code] section 352 prejudice by eliminating the danger the jury could consider the evidence for an improper purpose"].)

We reject Ayala's first issue.

II. Sufficiency of Evidence of Felony Receipt of Stolen Property Conviction

Ayala next contends Proposition 47 amended section 496 to require the prosecution to prove the value of stolen property exceeded $950 to sustain a felony conviction for receiving stolen property under that section. He asserts "this element should also apply to felony violations of Penal Code section 496d," the provision under

which Ayala was convicted. Accordingly, he contends his two convictions for receiving stolen property pursuant to section 496d (counts three and six) should be reversed because the People failed to present sufficient evidence of the property's value.

A. Relevant Procedural History

Before the sentencing hearing, Ayala's counsel moved to reduce his convictions on counts three and six to misdemeanors, "arguing that the value of the property – each vehicle in question … was less than $950." The court noted this issue is before the Supreme Court. It stated, "[h]owever, when I read 496d, there's no issue about value. It's just stealing the motor vehicle. It looks like regardless of value, it's a felony if you just take the literal wording of the statute. [¶] So … even if there is a factual issue, the statute says there's no reduction or it doesn't have a value provision, which would be a basis to reduce it to a misdemeanor." Accordingly, the court denied the motion noting, "[e]ven if there is a factual issue … both [Nunez and Immediano] had opinions that their vehicles had values greater than $950."

B. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence " 'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) The reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) It is the jury, not the appellate court, which must be convinced of a defendant's guilt beyond a

reasonable doubt. (*Ibid*.) If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Ibid*.)

We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis … is there sufficient substantial evidence to support" ' the jury's verdict." (*Ibid*.)

C. Applicable Law

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70 (Voter Information Guide).) To these ends, Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history." (*People v. Dehoyos* (2018) 4 Cal.5th 594, 597 (*Dehoyos*); accord, *People v. Martinez* (2018) 4 Cal.5th 647, 651 (*Martinez*).) Specifically, it expressly redefined numerous offenses including theft of, or receiving, property worth $950 or less. (§§ 490.2, subd. (a), 496, subd. (a); *Dehoyos, supra*, 4 Cal.5th at pp. 597–598; accord, *Martinez, supra*, 4 Cal.5th at p. 651.)

D. Analysis

Ayala first argues Proposition 47's enactment of section 490.2 "replaced distinctions based on the type or manner of theft by relying exclusively on the dollar value of the property taken." He asserts "under both the intent of Proposition 47, the 'rule of lenity,' and the canons of statutory construction, section 490.2" amended the elements of committing an offense in violation of section 496d so that such an offense is a misdemeanor when the stolen car's value does not exceed $950. He further contends excluding persons who receive stolen vehicles worth $950 or less from Proposition 47 relief violates equal protection under the federal and state constitutions.

1. Proposition 47 did not amend section 496d

Through its enactment of section 490.2, Proposition 47 provided that any crime of *theft* previously considered a felony must be reduced to a misdemeanor if: (1) the value of the stolen property does not exceed $950; and (2) the defendant has not been convicted of a prior offense as specified in section 490.2, subdivision (a). Proposition 47 also amended section 496, subdivision (a), to provide that any person convicted under that section of buying or receiving any stolen property where the property's value does not exceed nine hundred fifty dollars ($950) shall be convicted of a misdemeanor, if such person has no prior convictions under section 667, subdivision (e)(2)(C)(iv) or for an offense requiring registration pursuant to section 290, subdivision (c).

Unlike the amendments it made to section 496, subdivision (a), Proposition 47 did not clearly amend the terms of section 496d, the statute under which Ayala was convicted in counts three and six, which relates to receipt of a stolen motor vehicle with knowledge it is stolen. (See § 496d.) And there is a split of authority on whether Proposition 47 can be construed to apply to section 496d.

In *People v. Varner* (2016) 3 Cal.App.5th 360, the Fourth District Court of Appeal held Proposition 47 does not apply to section 496d, so the trial court did not err in denying the defendant's petition for resentencing of his conviction on that basis. (*Id*. at

pp. 366–367.) The *Varner* court held that "section 496d is not included in section 1170.18. Moreover, there is no indication that the drafters of Proposition 47 intended to include section 496d. Construing the plain language of section 1170.18 to include section 496d would be inconsistent with our Supreme Court's determination that we may not 'add to the statute or rewrite it to conform to some assumed intent not apparent from that language.' " (*Ibid*.) In so holding, the court rejected the defendant's argument that the drafters of Proposition 47 intended to include section 496d based on the changes Proposition 47 made to the crimes of grand theft and petty theft pursuant to section 490.2. (*Id*. at p. 367.) Additionally, the court held because section 496, subdivision (a) "contains no reference to section 496d, we must assume the drafters intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies." (*Id*. at p. 367; see also *People v. Bussey* (2018) 24 Cal.App.5th 1056, 1062–1063 (*Bussey*), review granted Sept. 12, 2018, S250152 [holding Proposition 47 amendment reducing general crime of receiving stolen property to misdemeanor did not also reduce specific crime of receiving stolen vehicle to misdemeanor]; *People v. Orozco* (2018) 24 Cal.App.5th 667, 674, review granted Aug. 15, 2018, S249495 [same].)

However, in *People v. Williams* (2018) 23 Cal.App.5th 641, the First District Court of Appeal held "[t]here does not seem to be any logical basis to distinguish between the receipt of stolen property [under section 496, subdivision (a)] and receipt of a stolen vehicle under Proposition 47," particularly given that Proposition 47 "should be read broadly to effectuate the voters' intent." (*Id*. at pp. 649–650.) Accordingly, the *Williams* court concluded "section 496d falls within Proposition 47." (*Id*. at p. 651.)

Given the plain text of the statutes, we find the *Varner* court's analysis more persuasive. The Legislature could have expressly amended section 496d, as it amended section 496, subdivision (a), but it failed to do so. And receiving a stolen vehicle is not theft; thus, it is not encompassed in section 490.2. (See § 484 [defining theft].) Indeed,

as the trial court instructed the jury, generally, a defendant cannot be convicted of both theft of a vehicle and receiving a stolen vehicle. (See *People v. Garza* (2005) 35 Cal.4th 866, 874.) Accordingly, Proposition 47 did not amend section 496d such that the prosecution was now required to prove the value of the stolen cars exceeded $950.

The Supreme Court's decisions in *People v. Page* (2017) 3 Cal.5th 1175 (*Page*) and *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*) do not compel a different result. Ayala argues "the *Page* decision clarified that simply because a theft offense is not enumerated in Proposition 47, does not mean it does not come within the ameliorative provisions of that law." But *Page* and *Romanowski* dealt with crimes previously classified as grand theft and the Supreme Court considered whether stealing a particular type of property (a vehicle or access card information, respectively) could constitute petty theft. (See *Page*, *supra*, 3 Cal.5th at pp. 1182–1183; *Romanowski*, *supra*, 2 Cal.5th at p. 907.) Neither case considered Proposition 47's applicability to an offense not a pure theft, as is the case here, i.e., one not identified as a grand theft and which requires additional necessary elements beyond the theft itself. (*People v. Soto* (2019) 23 Cal.App.5th 813, 822–823.) And nothing in these opinions "suggests that section 490.2 extends to any course of conduct that happens to include obtaining property by theft worth less than $950." (*Id.* at p. 822; see also *Bussey*, *supra*, 24 Cal.App.5th at p. 1063.) Accordingly, because the People were not required to prove the value of the cars was greater than $950, Ayala's challenge to the sufficiency of the evidence on that basis as to Counts 3 and 6 fails.

Regardless, here the People did present evidence of the value of the stolen cars in Ayala's possession. Both Immediano and Nunez testified they believed their cars to be worth over $1000. Relying on this testimony, the prosecutor argued in closing that Immediano testified the car "was worth a few thousand dollars, well above the 950" and Nunez "testified the car could have been worth between a thousand and $2,000." Viewing this evidence in the light most favorable to the verdict, as we must, there was

substantial evidence upon which the jury could have relied to conclude the value of the cars exceeded $950.

2. Denying defendants charged under section 496d relief under Proposition 47 does not violate the Equal Protection Clause

Ayala next argues the fact he would be guilty of a misdemeanor pursuant to Proposition 47 for the same criminal act of receiving a stolen vehicle worth $950 or less, had he been charged and convicted under section 496, subdivision (a) as opposed to section 496d, violates the equal protection clause. We disagree.

The federal equal protection clause (U.S. Const., 14th Amend.) and the California equal protection clause (Cal. Const., art. I, § 7, subd. (a)) provide that all persons similarly situated should be treated alike. But in *People v. Wilkinson* (2004) 33 Cal.4th 821 (*Wilkinson*), the California Supreme Court expressly held, "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*Id.* at p. 838.) Thus, the fact sections 496 and 496d both criminalize receipt of stolen property is, in and of itself, insufficient to establish an equal protection violation. (See *Wilkinson, supra,* at p. 838.)

The *Wilkinson* court further held the rational basis test is applicable to an equal protection challenge involving " 'an alleged sentencing disparity.' " (*Wilkinson*, *supra*, 33 Cal.4th at pp. 837-838.) It explained, "numerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, ' "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]" ' the defendant cannot make out an equal protection violation." (*Id.* at pp. 838–839.)

Ayala has not made the requisite showing to establish an equal protection violation. Rather, there are several plausible reasons for the alleged sentencing disparity between a section 496d conviction and a section 496, subdivision (a) conviction.

Section 496d was added "to the Penal Code to encompass only motor vehicles related to the receiving of stolen property." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998 [arguments in support].) Additionally, the "'proposal [was to] provide additional tools to law enforcement for utilization in combating vehicle theft and prosecuting vehicle thieves. Incarcerating vehicle thieves provides safer streets and saves Californians millions of dollars. These proposals target persons involved in the business of vehicle theft and would identify persons having prior felony convictions for the receiving of stolen vehicles for enhanced sentences.' " (*Ibid*.)

Given the stated purposes underlying the addition of section 496d to the Penal Code, the voters could have reasonably determined that in targeting those involved in the *business* of vehicle theft, the statute criminalized more serious conduct than the petty theft and petty theft-related conduct at which Proposition 47 was directed. (See *Bussey*, *supra*, 24 Cal.App.5th at p. 1064.) Indeed, the offense of buying or receiving a stolen vehicle, as opposed to other property, may have greater adverse consequences for the victims than other theft-related offenses because the owners of vehicles are often dependent on their vehicles for transportation to work and school, and for obtaining the necessities of life. (*Ibid*.) And unlike other types of stolen property, stolen vehicles may be dismantled and sold for parts in "chop shops" which can raise their worth above retail value. (*Ibid.* ["Even a stolen car of low value can fuel a profitable illicit dismantling operation (the whole in this instance being less than the sum of its parts), and thus the receipt is more serious than the theft"].)

The voters could have also reasonably determined that given the modern market value of most motor vehicles, trailers, construction equipment and vessels, including

section 496d within the scope of Proposition 47 would do little to advance the initiative's stated goal "to reduce the number of prisoners serving sentences for nonviolent crimes, both to save money and to shift prison spending toward more serious offenses." (*Romanowski, supra,* 2 Cal.5th at p. 907.) As the *Varner* court explained, "The electorate could consider that only an insignificant number of persons would be prosecuted under section 496d for a vehicle valued under $950. Most would be prosecuted under section 496, subdivision (a) if the 'interests of justice' warranted conviction under that section. Moreover, the electorate could reasonably choose to include section 496, subdivision (a) violations but exclude, for now, violations of section 496d." (*Varner, supra,* 3 Cal.App.5th at p. 370.)

Finally, "it is plausible that the drafters elected to proceed in an incremental way, gauging the effects of the proposition's sea change in penal law, and—in light of the small number of functioning vehicles worth under $950 at present values—did not consider it an injustice to fail to include them and instead leave the matter to the charging discretion of prosecutors." (*Bussey*, *supra*, 24 Cal.App.5th at p. 1064; see also *People v. Acosta* (2015) 242 Cal.App.4th 521, 527–528 ["the electorate could rationally extend misdemeanor punishment to some nonviolent offenses but not to others, as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system. 'Nothing compels the state "to choose between attacking every aspect of a problem or not attacking the problem at all" ' "].) Accordingly, because there are several rational bases for treating receiving stolen vehicles under section 496d differently than receiving other stolen property under section 496, Ayala has failed to establish an equal protection violation.

We also reject Ayala's equal protection challenge asserting those convicted of a vehicle theft crime (§ 490.2) are similarly situated to defendants convicted of the section 496d crime of receiving a stolen vehicle. He has not established those who steal a vehicle are similarly situated to those who buy or receive a stolen vehicle, for purposes of

equal protection. As discussed, theft and the crime of receiving or buying stolen property are district crimes, even if the stolen property may be of the same nature. (See *People v. Gutierrez* (2016) 245 Cal.App.4th 393, 403-404 ["[p]ersons convicted of different crimes are not similarly situated for equal protection purposes."].) Accordingly, we cannot conclude Ayala has established a violation of the equal protection clause.

We reject Ayala's second issue.

III. The trial court did not err by failing to instruct the jury, sua sponte, that the People had to prove the value of the cars exceeded $950

Ayala next argues the trial court reversibly erred by failing to sua sponte instruct the jury the People had the burden of establishing the stolen cars' values exceeded $950 "[b]ecause this is a necessary element of the offenses charged in counts three and six." We disagree.

" ' "It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence" ' and ' "necessary for the jury's understanding in the case." ' " (*People v. Brooks* (2017) 3 Cal.5th 1, 73.) However, we have already concluded the value of the stolen vehicle received is not an element of an offense under section 496d, the statute pursuant to which Ayala was charged in counts three and six. Thus, this was not a general principle of law relevant to the issues raised by the evidence as to those charges. Additionally, because we have already concluded Ayala's convictions for violating section 496d (receiving a stolen vehicle) are not eligible for reduction to a misdemeanor, even if the evidence showed and the jury determined the cars' values did not exceed $950, any error in failing to instruct the jury on how to value the cars was harmless.[4]

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[4] To the extent Ayala is arguing the trial court erred in failing to sua sponte instruct the jury that the People were obligated to establish the value of the car in order to prove counts two and five (violations of Veh. Code, § 10851), the value of the vehicle would only be an element of such charges if these counts were based on vehicle *theft* as opposed to a temporary taking or posttheft driving. (See *Page, supra,* 3 Cal.5th at

We reject Ayala's third issue.

IV. The court did not err by failing to sua sponte instruct the jury on the legal definition of "theft"

Finally, Ayala argues reversal of his "convictions for receiving stolen property in violation of Penal Code section 496d is required because the trial court failed to instruct the jury as to the legal definition of the word 'theft,' which requires the intent to permanently deprive."

A. Relevant Factual Background

The trial court instructed the jury:

> "[Ayala] is charged in counts 3 and 6 with receiving a stolen motor vehicle in violation of Penal Code 496d(a). [¶] To prove [he] is guilty of this crime, the People must prove that:
>
> "1. [He] received a motor vehicle that had been stolen. [¶] And [¶]
>
> "2. When [he] received the vehicle, he knew that the vehicle had been stolen.
>
> "Property is stolen if it was obtained by any type of theft or by burglary or robbery.
>
> "[Ayala] is charged in Counts 2 and 5 with unlawful taking or driving a vehicle in violation of Vehicle Code section 10851. [¶] To prove that [he] is guilty of this crime, the People must prove that:
>
> "1. [He] took or drove someone else's vehicle without the owner's consent. [¶] And [¶]
>
> "2. When [he] did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time.
>
> "A taking requires the vehicle be moved for any distance, no matter how small. [¶] A vehicle includes a passenger

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pp. 1183–1184.) Regardless, we conclude any alleged error was harmless because the jury acquitted Ayala of these charges. Thus, he cannot establish he was prejudiced by any alleged error in failing to give such an instruction as to these counts.

> vehicle. [¶] A witness gave his opinion of the value of the property he owned. [¶] In considering the opinion, you may but are not required to accept it as true and correct."

B. Analysis

Ayala contends the trial court reversibly erred in failing to instruct the jury on the legal definition of "theft" which requires an intent to permanently deprive. He asserts "[t]he jury was instructed as to the lesser degree of intent required to be proved by the prosecution to sustain a conviction under Vehicle Code section 10851" which was "inherently confusing." He argues "absent complete instructions as to the level of intent required to find a vehicle was stolen by theft, the jury was likely to apply the lower standard, thereby reducing the prosecution's burden of proof." He asserts the alleged instructional error rendered his trial "fundamentally unfair." The People respond that Ayala's "convictions did not require that the jury find he acted with a particular intent or that he knew that the person who did steal the car(s) acted with a particular intent."

Even assuming, arguendo, the trial court had a sua sponte duty to instruct the jury on the definition of theft for purposes of counts three and six, we cannot conclude Ayala was prejudiced by the failure to do so. Here, the uncontroverted evidence established Immediano and Nunez's cars were stolen or taken by theft, that is, taken with the intent to deprive the owners of possession. Neither of the vehicle owners gave anyone permission to take their cars and law enforcement was notified their cars were missing. The ignitions of both cars had been tampered with such that a shaved key could be used to start them. The cars were found in Ayala's possession and he did not have permission to drive them. There was no evidence or argument presented that the person who took the cars intended to return them. (*Cf. People v. MacArthur* (2006) 142 Cal.App.4th 275, 280 [concluding trial court prejudicially erred by not instructing jury on definition of theft where defendant was convicted of receiving stolen property based on pawning jewelry belonging to his girlfriend's mother but there was evidence defendant or his girlfriend may not have had necessary intent to deprive mother of possession of jewelry].)

Accordingly, we cannot conclude it was reasonably probable Ayala would have achieved a more favorable result had the jury been instructed on the definition of theft as it relates to counts three and six.

We reject Ayala's fourth contention.

V. Correction of Abstract of Judgment

The abstract of judgment in this matter lists the relevant section numbers as to Ayala's convictions of counts three and six as sections 496(a) and 496(D), respectively. However, Ayala was charged and convicted of these counts pursuant to section 496d, subdivision (a). Though the parties do not discuss this clerical error, it is within our power to correct it. (See *People v. Jones* (2012) 54 Cal.4th 1, 89.) Accordingly, the abstract of judgment should be amended to reflect the correct section pursuant to which Ayala was convicted as to counts three and six, section 496d, subdivision (a).

DISPOSITION

The judgment is affirmed. The trial court is ordered to prepare an amended abstract of judgment reflecting that Ayala was convicted of counts three and six under Penal Code section number 496d, subdivision (a) and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

_____
SNAUFFER, J.

WE CONCUR:

_____
MEEHAN, Acting P.J.

_____
DE SANTOS, J.